

**Dayton Power and Light Company and Utility Workers of America, Local 175. Case 9-CA-18825**

16 August 1983

**ORDER REMANDING PROCEEDING FOR FURTHER HEARING**

BY CHAIRMAN DOTSON AND MEMBERS  
ZIMMERMAN AND DENNIS

On 14 June 1983 a hearing was held before Administrative Law Judge Thomas A. Ricci in the above-entitled proceeding. Prior to the presentation of any evidence on the merits of the case, Respondent moved to dismiss the complaint on the basis that the allegations contained in the complaint should be deferred to the contractual grievance procedure. The Administrative Law Judge concluded that Respondent's position had merit and accordingly, except for a single witness, whose testimony was curtailed by the Administrative Law Judge when Respondent indicated it would find it necessary to introduce evidence of its own to rebut this testimony, the Administrative Law Judge refused to accept any evidence with respect to either the merits of the charge or whether deferral to arbitration is appropriate. Thereafter, the General Counsel and the Charging Party filed requests for special permission to appeal the Administrative Law Judge's ruling and the Charging Party moved the Board to remand for a hearing *de novo* before a different administrative law judge.

Respondent filed an opposition to the request for special permission to appeal on the ground that Section 102.26 provides for interim appeals only with respect to "rulings on motions or objections and related orders."

On 22 July 1983 the Administrative Law Judge, without waiting for the Board to rule on the requests for special permission to appeal, issued his Decision recommending that the complaint be dismissed.

In their respective appeals, the General Counsel and the Charging Party contend, *inter alia*, that (1) refusal-to-supply-information cases are not generally subject to deferral and (2) the record developed is inadequate to permit the Board to pass upon either the issues of deferral or the merits.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Although the record is not entirely clear on this point, the Administrative Law Judge refused to receive any evidence regarding deferral, apparently on the ground that deferral raises purely a question

of law. We agree that the issue of deferral raises a question of law. However, since the law frequently turns on the facts, we are persuaded that the parties have a right to litigate this question.

In refusing to permit the introduction of evidence with respect to the allegations of the complaint, which alleges a violation of Section 8(a)(5) of the Act based on Respondent's unilateral changes with respect to established procedures governing reductions in force and the refusal to timely supply the Union with requested information regarding the processing of employees for layoff, the Administrative Law Judge concluded, *inter alia*, that "It is enough for me that the General Counsel has admitted that all the information that the Union wanted was finally given to them, period." To the extent the Administrative Law Judge's ruling is grounded on Respondent's ultimate compliance with the Union's request for information, the Administrative Law Judge erred as a matter of law. *Salem News Publishing Co.*, 230 NLRB 927, 929 (1977). That the union may have ultimately been supplied with the requested information does not preclude the finding of a violation under Section 8(a)(5) of the Act. *Unoco Apparel, Inc.*, 208 NLRB 601, 611 (1974).

In short, the Administrative Law Judge's refusal to hear evidence regarding the issues of deferral and the merits precludes a fair determination of whether the General Counsel has established a *prima facie* case that Respondent has failed to meet its bargaining obligations under Section 8(a)(5). In these circumstances, and because our examination of the record convinces us that it is wholly inadequate to permit either the parties to file exceptions or the Board to review them, we are constrained, in the interests of due process, to remand for a hearing in connection with both the merits and the question of deferral.<sup>1</sup>

We also find merit to the Charging Party's request that this matter be remanded for a hearing *de novo* before a different administrative law judge. As stated in *Indianapolis Glove Co.*, 88 NLRB 986, 987 (1950):

[I]t is essential not only to avoid actual partiality and prejudice . . . in the conduct of Board proceedings, but also to avoid even the appearance of a partisan tribunal.

See also *The New York Times Co.*, 265 NLRB 353 (1982); *Filmation Associates, Inc.*, 227 NLRB 1721

<sup>1</sup> Contrary to Respondent's contention, the Board has broadly construed Sec. 102.26 of the Rules and Regulations regarding the subject matter of interim appeals to an administrative law judge's rulings.

(1977); *Center for United Labor Action*, 209 NLRB 814 (1974).

A reading of the record *in toto* conveys the impression that even before the hearing opened the Administrative Law Judge had predetermined that this case should be deferred to the grievance procedure and that he approached this case with a closed mind in regard to both the question of deferral and the merits of the complaint. Accordingly, the General Counsel's and the Charging Party's requests for special permission to appeal are granted, the Administrative Law Judge's ruling is reversed,<sup>2</sup> and we shall remand this proceeding to the Chief Administrative Law Judge for a hearing *de novo* before a different administrative law judge duly designated by him, who shall prepare and serve on the parties a decision containing findings of fact, conclusions of law, and recommendations with respect to the unfair labor practices alleged in the complaint herein.

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<sup>2</sup> In light of our decision to grant the requests for special permission to appeal, the Administrative Law Judge's Decision issued 22 July 1983 is hereby vacated.

## ORDER

It is hereby ordered that the General Counsel's and the Charging Party's requests for special permission to appeal are granted, the Administrative Law Judge's ruling is reversed, and his decision of 22 July 1983 is vacated.

IT IS FURTHER ORDERED that a hearing *de novo* be held before a different administrative law judge for the purpose of receiving evidence on the issues raised by the allegations of the complaint and whether deferral to the contractual grievance procedure is appropriate.

IT IS FURTHER ORDERED that, upon conclusion of the hearing, the administrative law judge shall prepare and serve on the parties a decision containing findings of fact, conclusions of law, and recommendations based on the evidence received and that, following service of such decision on the parties, the provisions of Section 102.46 of the Board's Rules and Regulations, Series 8, as amended, shall be applicable.